IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

CRL.A.No. 395 of 1999()

CRA.92/1998 of V ADDL.SESSIONS COURT, ERNAKULAM

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APPELLANT:

ALIYAS K.PATHROSE, KANIYAMPEDICKAL HOUSE
VADAYAMPADY P.O., PUTHENCRUZE,
ERNAKULAM.

BY ADV. SRI.P.K.BEHANAN

RESPONDENTS:

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1. K.P.JOSEPH, PROPRITOR,
K.P.JOSEPH & COMPANY,
STOCK & SHARE BROKERS,
VEEYEM BUILDING, KOLENCHERY.

2. STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, EKM.

BY ADV. SRI.K.A.JALEEL
SRI.C.ANIL KUMAR
PUBLIC PROSECUTOR C.K.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.R.UDAYABHANU, J

Crl.A.No. 395/1999

Dated this 20th day of September, 2007

JUDGMENT

The appellant is the complainant who had initiated proceedings under Section 138 of the Negotiable Instruments Act. The trial Court convicted the accused but the lower appellate Court reversed the finding of the trial Court and acquitted the accused.

2. The case of the complainant/appellant is that he had entrusted the accused who is a share broker to sell shares that he had purchased since 1990. It is mentioned that the complainant was working in the Middle East and on his return, he purchased shares through the accused and entrusted the shares to be sold also with the accused and towards the amount due, the cheque for Rs.3.25 Lakhs was issued which was dishonoured due to insufficiency of funds in the account. No reply was received for the lawyer notice sent and no amount was re-paid.

3. The evidence adduced in the testimony consisted of PW1 and 2, Exts.P1 to P9 and DW1 and 2. It

is the evidence of PW1, the complainant, that towards the amount due, the accused had issued two cheques earlier for a sum of Rs.3.5 Lakhs and Rs.136096/- and also executed a promissory note for a sum of Rs. 3.5 Lakhs, ie, Ext.P9 and also executed an agreement as per which a sum of Rs.3.5 Lakhs was agreed to be paid and in default his share broker's certificate would be pledged. The complainant instituted proceedings with respect to the dishonour of the other two cheques. On 20.11.1995 after receipt of lawyer notice with respect to the two cheques and the promissory note, the accused had approached DW1 and re-paid the cheque for an amount of Rs.2.25 Lakhs towards the amount due under the promissory note. Two/three days prior to that as the agreement period was about to expire, he issued the amount cheque for Rs.3.25 Lakhs which was dishonoured.

4. The case of the defence is that only a sum of Rs.3.25 Lakhs was borrowed as per the promissory note and towards the sum, an agreement was executed and three blank cheques were also given. DW1 is the lawyer

who issued the lawyer's notice on behalf of the complainant and DW2 is the junior Advocate to DW1. DW2 has stated that there was a talk in the office of DW1 on 20.11.1995 among the parties. PW1 has also admitted in the cross examination that there was a talk in the office of DW1. DW1 has testified that 2.25 Lahks was paid by the accused on 20.11.1995 towards the amount due under the promissory note. But he has denied that there was a settlement on that particular day. PW1 when cross examined has agreed to the suggestion that there was a settlement. It is in the light of the evidence of DW1 that an amount of Rs.2.25 Lakhs was paid on 20.11.1995 with respect to the amount due under the promissory note.

5. The trial Court convicted the accused but the lower appellate Court found that the evidence of DW1 and PW1 is contradictory, as PW1 has denied that there was a settlement on the particular day at his office. The lower appellate Court totally disbelieved the version of the complainant and was inclined to agree with the version of the defence only the entire transactions were

with respect to the borrowal of a sum of Rs.3.25 Lakhs and nothing else. I find that the lower appellate Court was totally misleaded just because the Court was not inclined to believe the version of DW1. It was found that DW1 was only supporting the case of the complainant. It is noted that DW1 is the lawyer of the complainant. I find that the view of the lower appellate Court in this regard appears totally erroneous as the very basis of the transactions in between the complainant and the accused is the transactions in shares. There is no case for the complainant that there was a loan transaction between the complainant and the accused. It is to be noted in particular that no reply notice was sent with respect to the proceedings initiated, with respect to the other two cheques and promissory note. I find nothing to disbelieve the version of DW1 that an amount of Rs.2.25 Lakhs towards the amount is due under the promissory note and there is endorsement on the promissory note. It is the case that the endorsement is not signed by the accused as well. But it is not to be discarded as such in view of the version of PW1 and that of DW1 as well. The signature in the cheque is admitted. The lawyer notice

issued was not replied too. In the circumstances and in view of the evidence of PW1, I find that the execution of the promissory note stands proved and the presumptions stand unrebutted.

6. In the circumstances, the finding of the lower appellate Court in acquitting the accused is set aside. The accused is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act. The accused/respondent is sentenced to undergo imprisonment till the rising of the Court and to pay an amount of compensation of Rs.3.25 Lakhs and in default to undergo simple imprisonment for three months. The respondent/accused is granted six months time to pay the amount of compensation. He shall appear before the Judicial Magistrate of First Class, Kolenchery, on 21.3.2008 to receive the sentence.

The appeal is disposed of accordingly.

K.R.UDAYABHANU
JUDGE

mrcs